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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/564,242	09/11/2006	Robert McDonald	Garlic -1 US	8026

61212 7590 11/15/2006

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EXAMINER	
MI, QIUWEN	

ART UNIT	PAPER NUMBER
1655	

DATE MAILED: 11/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/564,242	MCDONALD, ROBERT	
	Examiner	Art Unit	
	Qiuwen Mi	1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-15 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-15 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections -35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless -
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-12, 14 and 15 are rejected under 35 USC § 102 (b) as being anticipated by Hsu (US 6,231,865).

A method for controlling fungal infestation of plants via applying a composition comprising garlic extract and a liquid carrier thereto is claimed.

Hsu teaches a method for inhibiting fungal growth (i.e., infestation) in plants via spraying a composition comprising garlic extract and a liquid carrier consisting essentially of water onto the plant leaves. Hsu also specifically points out that a ratio of 5-98% garlic extract can be used (see entire document including, e.g., col 1, lines 7-41 and col 3, lines 1-5). Please also note that the plants on which Hsu discloses the fungi grow read upon the instant claim limitation "host medium " (see, e.g., instant claim 5) since the fungi do, in fact, grow thereon and, thus, utilize the plants as a host medium for such growth.

Therefore, the reference is deemed to anticipate the instant claims above.

Claims 1, 3-5, 7-9, 11-13, and 15 are rejected under 35 USC § 102 (e) as being anticipated by Fliermans (US 2005/0112393).

Fliermans teaches the application of an antifungal composition comprising garlic extract within a liquid solution consisting essentially of water as the carrier (e.g., phosphate buffered saline) including to turf grass (see entire document including, e.g., Abstract and paragraphs [0013], [0017], [0023], and Examples). Please also note that the various plant materials (e.g., wood, turf grass, etc) on which Fliersmans discloses the fungi grow read upon the instant claim limitation "host medium " (see, e.g., instant claim 5) since the fungi do, in fact, grow thereon and, thus, utilize the plants as a host medium for such growth.

Therefore, the reference is deemed to anticipate the instant claims above.

Claim Rejection -35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-15 are rejected under 35 U.S.C. 103(a) as obvious over Hsu (US 6,231,865) and Fliermans (US 2005/0112393).

Hsu beneficially teaches a method for inhibiting fungal growth (i.e., infestation) in plants via spraying a composition comprising garlic extract and a liquid carrier consisting essentially of

water onto the plant leaves. Hsu also specifically points out that a ratio of 5-98% garlic extract can be used (see entire document including, e.g., col 1, lines 7-41 and col 3, lines 1-5). Please also note that the plants on which Hsu discloses the fungi grow read upon the instant claim limitation "host medium " (see, e.g., instant claim 5) since the fungi do, in fact, grow thereon and, thus, utilize the plants as a host medium for such growth.

Fliermans also beneficially teaches the application of an antifungal composition comprising garlic extract within a liquid solution consisting essentially of water as the carrier (e.g., phosphate buffered saline) including to turf grass (see entire document including, e.g., Abstract and paragraphs [0013], [0017], [0023], and Examples). Please also note that the various plant materials (e.g., wood, turf grass, etc) on which Fliersmans discloses the fungi grow read upon the instant claim limitation "host medium " (see, e.g., instant claim 5) since the fungi do, in fact, grow thereon and, thus, utilize the plants as a host medium for such growth.

It would have been obvious to one of ordinary skill in the art to provide an anti-fungal composition comprising garlic extract and a liquid carrier consisting essentially of water, as well as to apply such an antifungal composition to plants (including turf grass) in need thereof based upon the beneficial teachings provided by the cited references, as discussed above. The result-effective adjustment in conventional working parameters (e.g., determining an appropriate concentration of garlic extract within such an anti-fungal composition) is deemed merely a matter of judicious selection and routine optimization which is well within the purview of the skilled artisan.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention.

Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Double Patenting Rejections

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 5-12, 14, and 15 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-5, 11 of copending Application No. 11/324,776. Although the conflicting claims are not identical, they are not patentably distinct from each other because both of the applications use garlic extract and a liquid carrier or liquid soil drench (water) to control fungal infestation. "Fungicide" of the claim 9 in the instant application has no significant difference with "inhibiting fungal infestation" and "anti-fungal" of the claims (3 and 1) in the copending Application No. 11/324,776. The concentration of garlic extract "approximately 10-30%" of the claims (1 and 3) in the copending Application No. 11/324,776 falls into the range of "approximately 5-30%" of the claims (6, 10, and 14) in the instant application. Application of the garlic extract and water to host medium as

in the instant application is not patentably distinct from application of the said extract to the soil as in the copending Application No. 11/324,776, as soil could be one kind of the host medium.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Conclusion

No claim is allowed.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to QIUWEN MI whose telephone number is 571-272-5984. The examiner can normally be reached on Monday through Friday: 8: 30 am to 5: 00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, TERRY MCKELVEY can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

MICHAEL MELLER
PRIMARY EXAMINER